

FILED
January 11, 2006
U.S. Bankruptcy
Court
Santa Rosa, CA

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

BRUCE SETH PORTNER,

No. 01-12808

Debtor(s).

Memorandum re Objection to Claim of FTB

The issue now before the court is whether the trustee may set off a claim to a tax refund against the claim of the California Franchise Tax Board where the statutory deadline for claiming a refund had passed before bankruptcy.

California Revenue and Taxation Code § 19306 provides, in pertinent part:

No credit or refund shall be allowed or made after four years from the last day prescribed for filing the return . . . unless before the expiration of the period a claim is filed by the taxpayer

Debtor Bruce Portner did not file timely income tax returns for 1996 through 1999, so the FTB issued uncontested tax assessments for these years. Portner made payments during 1999 and 2000 which were applied to these tax years. Portner filed his Chapter 11 petition in November, 2001, and finally filed his 1996 through 1999 returns on October 15, 2002. These returns showed that Portner in fact overpaid his actual 1997 tax liability by \$42,602.00. The FTB has filed a claim against the estate for \$49,757.30 (priority) and \$9,715.31 (general unsecured) based on Portner's 2000 tax year liability. The issue is whether the Trustee (the case having been converted to Chapter 7) can set off the 1997

1 overpayment against this claim even though the four-year deadline of § 19306 was missed.

2 The court is not persuaded by either of the arguments the parties have made. The FTB relies
3 primarily on § 108(b) of the Bankruptcy Code, which (according to the FTB) governs the time for
4 demand of the 1997 refund, but this argument entirely begs the question of whether the refund can be used
5 as a *defense to the claim*. The Trustee relies primarily on § 105(a) of the Code, as if that section gave
6 the court *carte blanche* authority to do what seems to be the fair thing in every instance, which it does
7 not.¹

8 As the trustee correctly points out, a claim which are barred by an applicable statute of
9 limitations is often still available as defense. *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 415-16 (1998);
10 *Styne v. Stevens* (2001) 26 Cal.4th 42, 52. However, the statute at issue here is not a true statute of
11 limitations, which bars an action and must be asserted as an affirmative defense or waived. Claims to tax
12 refunds are not actions. *TLI, Inc. v. U.S.*, 100 F.3d 424, 427 (5th Cir. 1996). Where the right to claim a
13 tax refund has expired, the overpayment may not be set off against a tax claim on account of a different tax
14 year. *In re Clayton Magazines, Inc.*, 77 F.2d 852, 853 (2nd Cir. 1935)(“A set-off may not be allowed
15 here if [the government] is under no legal duty to refund the [earlier] tax.”).

16 Any lingering doubt in the court’s mind is dispelled by the wording of § 19306 itself. By
17 barring both refunds *and credits* after the four-year period has expired, it makes clear the intent of the
18 California Legislature that after time has expired the taxpayer is entitled to neither a refund nor an offset.
19 Nothing in federal bankruptcy law mandates a different result.

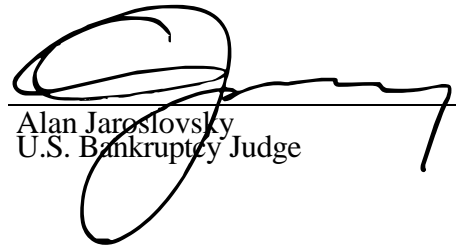
20 As a fallback position, the Trustee argues that the FTB has violated the automatic stay by not
21 refunding the overpayment without a request having been made. The court finds this argument
22 unpersuasive, as it was the right to claim the refund, and not the funds themselves, which was property of
23

24 ¹Trying to do what seems fair rather than determine the applicable law has many pitfalls. While
25 it is usually unfair to allow one creditor to be paid more than it is owed while other creditors remain
26 unpaid, the same concept of fairness may not apply where the creditor is a state seeking to balance its
budget for the benefit of all its citizens. In the end, this is path down which the court opts not to stray.

1 the estate.

2 For the foregoing reasons, the Trustee's objection to the claim of the FTB will be overruled.
3 Counsel for the FTB shall submit an appropriate form of order.²

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5 Dated: July 19, 2004

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7 Alan Jaroslovsky
8 U.S. Bankruptcy Judge
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²By email, in accordance with the court's established procedures.